IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.338 OF 2006

M/s.M.J. Exports Pvt. Ltd.
113, Jolly Maker Chambers
No.II, Nariman Point,
Bombay - 400 021. .. Petitioner.

V/s.

1. Union of India, through the Secretary, Ministry of Law Justice and Company Affairs, Aayakar Bhavan, M.K. Road, Churchgate, Bombay - 400 020.

2. Central Board of Excise & Customs, Department of Revenue, Ministry of Finance & Company Affairs, Government of India Through Director, Drawback.

3. Chief Commissioner of Customs New Custom House, Ballard Estate, Mumbai - 400 001

4. Commissioner of Customs, New Custom House, Ballard Estate, Mumbai 400 001.

5. The Assistant Commissioner of Customs, Appraising Group VB New Custom House, Ballard Estate, Mumbai 400 001

6. The Additional Commissioner of Customs (General), Mumbai

7. The Deputy Commissioner of Customs Central Revenue Recovery Cell, 6th Floor, Annexe Building, New Custom House, Ballard Estate, Mumbai - 400 001. .. Respondents.

Mr.Vikram Nankani with Ms.Sathe i/b. Madhur Baya for the petitioner.

Mr.A.J. Rana with Mr.P.S. Jetly for the respondents.

CORAM : R.M. LODHA &
J.P. DEVADHAR, JJ.

DATED : 28TH MARCH, 2006.

ORAL JUDGMENT (Per R.M. Lodha, J.) :

Rule. Returnable forthwith. The advocate on record for the respondents waives service. By consent, rule is heard finally at this stage.

2. In the light of the submissions advanced before us by the senior counsel and the counsel for the parties, we find that two questions arise for our consideration :

one) Is M.J. Exports (the petitioner) liable to pay interest on the delayed payment of duty under Section 28AA of the Customs Act, 1962 from 26th August, 1995 (immediately after three months of coming into force of Section 28AA) or from 14th November, 2001 (on expiry of three months from the date of decision of the Supreme Court dated 14th August, 2001) ?

two) Is the interest in the sum of Rs.4,67,02,251/- as demanded by the

respondent No.4 from M.J. Exports (the petitioner) vide communication dated 25th August, 2001 proper ?

Re : Question (one)

3. M.J. Exports Pvt. Ltd. (hereinafter referred to as 'M.J. Exports' or 'the petitioner') imported 53 numbers of Haemodialysis Machines and accessories and spares under an Open General License (OGL). They claimed exemption under Exemption Notification No.208/81-cus for the import of the said machines. Admittedly the said machines after the import were exported by M.J. Exports to the erstwhile USSR.

4. The Customs Department issued a show cause notice dated 25th March, 1989 to M.J. Exports for exporting the machines outside the country without carrying out any process. On 6th April, 1993 another show-cause notice was issued to them under Section 124 of the Customs Act, 1962 for clearance of 53 numbers of Haemodialysis Machines and accessories and spares under an OGL by evading customs duty to the tune of Rs.2,94,42,867/- and exporting the same to USSR without utilising the goods in India.

5. On 28th January, 1994, the Collector of Customs, Bombay after hearing M.J. Exports in response to the show-cause notice under Section 124 of the Customs Act, 1962 passed an order that they were not entitled to Exemption Notification No.208/82-cus dated 22nd September, 1981 and that the duty of customs amounting to Rs.2,94,42,867/- shall be recovered from them under proviso to Section 28(1) of the Customs Act, 1961. The Collector of Customs also imposed penalty of Rs.1,00,00,000/- on them under Section 112(a) of the Customs Act, 1961. Though the Haemodialysers were liable for confiscation, the Collector of Customs noted that the said goods having already been exported, those were not available for confiscation.

6. M.J. Exports felt aggrieved by the order dated 28th January, 1994 passed by the Collector of Customs - II, Bombay and filed an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT). The two members of the CEGAT differed in their opinion and the matter was referred to the third member. Ultimately, in view of the majority opinion, the appeal filed by M.J. Exports was allowed on 20th May, 1999 and the order passed by the Collector of Customs was set aside.

7. This time, the revenue felt aggrieved by the order of the CEGAT and carried the matter to the Supreme Court. The Supreme Court vide its order dated 14th August, 2001 set aside the order of the CEGAT and restored the order of the Collector of Customs dated 28th January, 1994 and confirmed the duty to the tune of Rs.2,94,42,687/- and penalty of Rs.1,00,00,000/-.

8. Going a little backwards to have a full view of facts, it may be noticed here that in the appeal preferred by M.J. Exports against the order of the Collector of Customs dated 28th January, 1994, the petitioner made an application for dispensation of pre-deposit. By the order dated 26th October, 1994, CEGAT, passed a conditional order directing M.J. Exports to deposit a sum of Rs.1,50,00,000/- within 12 weeks from the date of receipt of the order and upon compliance, the deposit of balance duty amount and penalty amount was ordered to be dispensed with. M.J. Exports challenged the order dated 26th October, 1994 before the Delhi High Court. By an ad-interim order dated 25th January, 1995, the Division Bench of the Delhi High Court ordered that on depositing an amount of Rs.50,00,000/- within 12 weeks from the date of receipt of the order of the CEGAT, the appeal filed by the petitioner shall not

be dismissed. M.J. Exports challenged the said order before the Supreme Court. By its order dated 31st March, 1995, the Supreme Court dismissed the Special Leave Petition but extended the time for depositing the sum of Rs.50,00,000/- upto 30th April, 1995. The petitioner, accordingly, deposited a sum of Rs.50,00,000/- with the Customs authorities on 22nd April, 1995. When the matter further came up before the Delhi High Court after the notice was served on the Customs department, by its order dated 12th May, 1995, the Delhi High Court disposed of the writ petition and modified the order of the CEGAT dated 26th October, 1994 by directing that in addition to the deposit of Rs.50,00,000/-, the petitioner shall also furnish bank guarantee in the sum of Rs.50,00,000/-. In other words, the conditional pre-deposit order passed by the Tribunal on 26th October, 1994 stood modified by condition of pre-deposit of Rs.50,00,000/- and also bank guarantee in the sum of Rs.50,00,000/-.

9. The provision relating to delayed payment of duty was inserted in the Customs Act, 1962 by way of Section 28AA vide Act 22 of 1995. Section 28AA reads thus :

> "28AA. Interest on delayed payment of duty. - (1) Subject to the provisions contained in section 28AB, where a

person, chargeable with the duty determined under sub-section (2) of section 28, fails to pay such duty within three months from the date of such determination, he shall pay, in addition to the duty, interest at such rate not below eighteen per cent and not exceeding thirty-six per cent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazzette, on such duty from the date immediately after the expiry of the said period of three months till the date of payment of such duty :

Provided that where a person, chargeable with duty determined under sub-section (2) of section 28 before the date on which the Finance Bill, 1995 receives the assent of the President, fails to pay such duty within three months from such date, then, such person shall be liable to pay interest under this section from the date immediately after three months from such date, till the date of payment of such duty.

Explanation 1. - Where the duty determined to be payable is reduced by the Commissioner (Appeals), Appellate Tribunal or, as the case may be, the court, the date of such determination shall be the date on which an amount of duty is first determined to be payable.

Explanation 2. - Where the duty determined to be payable is increased or further increased by the Commissioner (Appeals), Appellate Tribunal or, as the case may be, the court, the date of such determination shall be, -

(a) for the amount of duty first determined to be payable, the date on which the duty is so determined;

(b) for the amount of increased duty, the date of order by which the increased amount of duty is first determined to be payable;

(c) for the amount of further

> increase of duty, the date of order on which the duty is so further increased.
>
> (2) The provisions of sub-section (1) shall not apply to cases where the duty or the interest becomes payable or ought to be paid on and after the date on which the Finance Bill, 2001 receives the assent of the President."

10. The petitioner has set up diverse grounds challenging the legality of levy of interest under Section 28AA. However, during the course of hearing Mr.Vikram Nankani, the learned counsel for the petitioner confined his argument to one aspect. His submission is : on the date Section 28AA came into force (26th May, 1995) and three months from such date, the liability to pay duty vide the order of the Collector of Customs stood suspended because of the pendency of the appeal before CEGAT and the interim order operating at that time; that CEGAT ultimately allowed the appeal and, therefore, there was no liability upon the petitioner to pay the duty until the order came to be passed by the Supreme Court on 14th August, 2001. The counsel would submit that there was no failure to pay the duty within three months from the date Section 28AA came into force and, in these circumstances, the interest cannot be levied upon the petitioner under Section 28AA from 26th August, 1995. According to him, if at all it is leviable, it could only be from the expiry of three

months of the order of the Supreme Court passed on 14th August, 2001.

11. On the other hand, Mr.A.J. Rana, the senior counsel argued that by the order of the Supreme Court passed on 14th August, 2001, the order of the Collector of Customs has been restored and, thus as on 28th January, 1994 M.J. Exports was liable to pay the duty of Rs.2,94,42,687/- and since they failed to pay the said duty within three months of coming into force of Section 28AA, they are liable to pay interest under Section 28AA from the date immediately after three months from the date of coming into force of Section 28AA.

12. From the facts that we have narrated above, it is clear that by the order dated 28th January, 1994, the Collector of Customs determined the duty and, accordingly, M.J. Exports became liable to pay the customs duty to the tune of Rs.2,94,42,687/- and penalty of Rs.1,00,00,000/-. It is true that the said order was challenged by the petitioner before CEGAT and at the time of coming into force of Section 28AA there was an interim order operating in favour of the petitioner and the petitioner also succeeded before CEGAT. However, in appeal that was carried by the revenue to the Supreme

Court, the order of CEGAT dated 20th May, 1990 was set aside and the order of the Collector of Customs passed on 28th January, 1994 was restored. It would be, thus, seen that on 26th May, 1995 when Section 28AA came into force, after receiving the assent from the President, the petitioner was liable to pay the duty already determined under sub-section 2 of Section 28. They failed to pay such duty within three months from 26th May, 1995. In terms of proviso appended to Section 28AA, the petitioner became liable to pay interest from the date immediately after three months from 26th May, 1995.

13. The submission of the counsel for the petitioner is that the expression 'fails to pay such duty' in Section 28AA indicates positive and deliberate inaction on the part of the person saddled with payment of customs duty and in the facts of the present case as the appeal was pending and the interim order was operative, non deposit of the duty determined by the Collector of Customs cannot be construed to be failure on the part of the petitioner to pay such duty under Section 28AA. We do not agree. The expression 'fails to pay such duty' in the context of Section 28AA, in our opinion would mean unable to pay such duty or choose not to pay the duty. The reason for not paying the duty may be many

and varied. The reason is not material nor the intention. What is important is the factum of non-payment of duty determined under sub-section 2 of Section 28 within three months from the date Section 28AA came into force. The fact that the petitioner did not pay duty (for whatever reason; may be because interim order of the Delhi High Court dated 26th October, 1994 was operating in petitioner's favour) within concessional period would render the petitioner liable to interest as ultimately the order of Collector of Customs was restored. The law-makers while enacting Section 28AA by providing interest on delayed payment for the first time gave an opportunity to a person chargeable of duty under sub-section 2 of Section 28 to discharge their liability of payment of duty within three months from the date of coming into force of Section 28AA. The proviso to Section 28AA is by way of concession to the defaulter to save payment of interest if the duty was paid within three months from the date the said provision came into force. If the defaulter failed to take advantage of such statutory concession and sought to wait until outcome of pending litigation arising out of chargeability of duty, he has to thank himself.

14. In our considered opinion, it has to be

held that the petitioner was chargeable of duty determination under sub-section 2 of Section 28 on 21st August, 1994 (i.e. before the date on which Section 28AA came into force) and since they failed to pay such duty within three months from the date of coming into force of Section 28AA, they are liable to pay interest from 26th August, 1995. The demand of interest from the petitioner on unpaid duty from 26th August, 1995 cannot be said to be bad-in-law.

Re : Question (two)

15. By the order dated 25th August, 1994, the respondent No.4 has demanded a sum of Rs.4,67,02,251/- towards interest on unpaid duty from 26th August, 1995. The calculation thereof is shown in the chart annexed with the communication dated 25th August, 2005. The calculation shows that the interest is calculated on the duty amount of Rs.2,94,42,867/- from 26th August, 1995. Mr.A.J. Rana, the learned senior counsel for the revenue did not dispute that under the interim order, the petitioner had deposited a sum of Rs.50,00,000/- on 22nd April, 1995 towards the duty. Though, upon appeal having been allowed by the CEGAT in the year 1999, the said sum of Rs.50,00,000/- was refunded in the year 2000, yet the fact remains that atleast for

the period from 26th August, 1995 until the refund of Rs.50,00,000/-, no interest could be charged on Rs.50,00,000/-. We do not intend to go into the calculation part in detail but suffice it to say that the calculation of interest by the respondent No.4 is not proper and it needs to be recalculated. As a matter of fact, Mr.A.J. Rana, the senior counsel for the revenue fairly submitted that the department shall have to give credit of Rs.50,00,000/- which the petitioner deposited on 22nd April, 1995 until it was refunded to the petitioner pursuant to the order of the CEGAT. He also stated that the interest rate shall have to be as per the notifications issued by the Central Government from time-to-time under Section 28AA.

16. We, accordingly, dispose of the writ petition by following order :

i) The demand of interest from the petitioner by the respondent No.4 on unpaid duty from 26th August, 1995 is legal and valid.

ii) The calculation of interest as communicated to the petitioner vide communication dated 25th August, 2005 is

not proper, and, therefore, set aside.

iii) The respondent No.4 is directed to re-calculate the interest from 26th August, 1995 by not charging interest on Rs.50,00,000/- from 26th August, 1995 until the date of return of the said amount to the petitioner.

iv) While re-calculating the interest, the respondent No.4 shall apply the interest rate as per the notifications issued by the Central Government under Section 28AA from time-to-time.

No costs.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)